

Question Q217

National Group: in the name of the Latvian Group

Title: The patentability criterion of inventive step / non-obviousness

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Questions

I. I. Analysis of current law and case law

The Groups are invited to answer the following questions under their national laws:

Level of inventive step / non-obviousness

1.1. What is the standard for inventive step / non-obviousness in your jurisdiction? How is it defined?

An invention shall be deemed as conforming with the inventive step if, taking into consideration the state of the art, the invention is not obvious to a person skilled in the art, (Art. 7(1) of the Patent law). Non-obviousness is defined as follows: a person with ordinary skill in the art should not be able to derive the claims of the invention.

1.2. Has the standard changed in the last 20 years? Has the standard evolved with the technical / industrial evolution of your jurisdiction?

Latvian Patent law has come into force in March 1995 and has been revised in years 2002, 2004, 2007 and 2010, the standard for inventive step has not changed within the last 15 years.

1.3. Does your patent-granting authority publish examination guidelines on inventive step / non-obviousness? If yes, how useful and effective are the guidelines?

No, it doesn't .

1.4. Does the standard for inventive step / non-obviousness differ during examination versus during litigation or invalidity proceedings?

Latvian Patent office does not conduct examination on patentability , therefore novelty as well as inventive step / non-obviousness examination are held only during litigation or invalidity proceedings.

Construction of claims and interpretation of prior art

- 1.5. How are the claims construed in your jurisdiction? Are they read literally, or as would be understood by a person skilled in the art?

The description and claims of the invention has to disclose the invention in a manner sufficiently clear and complete so that a specialist would be able to carry out this invention. Claims contain the nearest prior art portion and a portion of novel features.

- 1.6. Is it possible to read embodiments from the body of the specification into the claims?

Yes, it is possible.

- 1.7. How is the prior art interpreted? Is it read literally or interpreted as would be understood by a person skilled in the art? Is reliance on inherent disclosures (aspects of the prior art that are not explicitly mentioned but would be understood to be present by a person skilled in the art) permitted?

Prior art is interpreted as would be understood by a person skilled in the art.

- 1.8. Do the answers to any of the questions above differ during examination versus during litigation?

No, they don't, since no substantive examination is held in the Latvian Patent office during registration procedure. As from 2007 it is possible that the court during proceedings ask the Patent Office to give their technical opinion on patentability criteria. In these cases the Office follows problem-solution approach developed at the EPO

Combination or modification of prior art

- 1.9. Is it proper in your jurisdiction to find lack of inventive step or obviousness over a single prior art reference? If yes, and assuming the claim is novel over the prior art reference, what is required to provide the missing teaching(s)? Is argument sufficient? Is the level of the common general knowledge an issue to be considered?

Yes, it is. Arguments are sufficient. Also, the level of common general knowledge can be considered.

- 1.10. What is required to combine two or more prior art references? Is an explicit teaching or motivation to combine required?

Motivation can be required.

- 1.11. When two or more prior art references are combined, how relevant is the closeness of the technical field to what is being claimed? How relevant is the problem the inventor of the claim in question was trying to solve?

The closeness of the technical field could be crucial. The problem to solve should be the same.

- 1.12. Is it permitted in your jurisdiction to combine more than two references to show lack of inventive step or obviousness? Is the standard different from when only two references are combined?

It is not either permitted nor allowed. However the combination of more than two references without explicit teaching could be interpreted in favour of presence of the inventive step.

- 1.13. Do the answers to any of the questions above differ during examination versus during litigation?

No, they don't, see art.8

Technical Problem

1.14. What role, if any, does the technical problem to be solved play in determining inventive step or non-obviousness?

Technical problem to be solved allows to evaluate non-obviousness of the proposed decision.

1.15. To what degree, if any, must the technical problem be disclosed or identified in the specification?

Technical problem should be disclosed in specification to extent it elucidates the invention and is solved in this patent.

Advantageous effects

1.16. What role, if any, do advantageous effects play in determining inventive step or non-obviousness?

It plays a role of a supporting argument

1.17. Must the advantageous effects be disclosed in the as-filed specification?

Can be, but not obligatory

1.18. Is it possible to have later-submitted data considered by the Examiner?

n/a, see art.8. However if submitted the data will be kept in the file for eventual evaluation during court proceedings.

1.19. How "real" must the advantageous effects be? Are paper or hypothetical examples sufficient?

If disclosed in the specification the advantageous effects should be disclosed to extent of being convincing

1.20. Do the answers to any of the questions above differ during examination versus during litigation?

No, they don't, see art.8

Teaching away

1.21. Does your jurisdiction recognize teaching away as a factor in favor of inventive step / non-obviousness? Must the teaching be explicit?

n/a in the Patent office, but in case of court proceedings the judge and parties may refer to recommendations for examination of EPO.

1.22. Among the other factors supporting inventive step / non-obviousness, how important is teaching away?

Its importance is considered in combination with other proof of non-obviousness, if arguments are not strong enough, this factor can provide a support in favour of presence of inventive step.

1.23. Is there any difference in how teaching away is applied during examination versus in litigation?

No, they don't, see art.8

Secondary considerations

1.24. Are secondary considerations recognized in your jurisdiction?

Until now they are not. If only in a certain court case the parties agree to take into account such argument.

1.25. If yes, what are the accepted secondary considerations? How and to what degree must they be proven? Is a close connection between the *claimed* invention and the secondary considerations required?

1.26. Do the answers to any of the questions above differ during examination versus during litigation?

No, they don't, see art.8

Other considerations

1.27. In addition to the subjects discussed in questions 4 - 26 above, are there other issues, tests, or factors that are taken into consideration in determining inventive step / non-obviousness in your jurisdiction?

If yes, please describe these issues, tests, or factors.

n/a in the Patent office, but in case of court proceedings the judge and parties may refer to recommendations for examination of EPO.

Test

1.28. What is the specific statement of the test for inventive step/non-obviousness in your jurisdiction? Is there jurisprudence or other authoritative literature interpreting the meaning of such test and , if so, provide a brief summary of such interpretation.

n/a in the Patent office, in case of court proceedings the judge and parties may refer to recommendations for examination of EPO.

1.29. Does such test differ during examination versus during litigation?

No, they don't, see art.8

Patent granting authorities versus courts

1.30. If there are areas not already described above where the approach to inventive step / non-obviousness taken during examination diverges from that taken by courts, please describe these areas.

No, there aren't

1.31. Is divergence in approach to inventive step / non-obviousness between the courts and the patent granting authority in your jurisdiction problematic?

No, it is not. In case of court proceedings Patent office is asked to provide technical opinion on the matter.

Regional and national patent granting authorities

1.32. If you have two patent granting authorities covering your jurisdiction, do they diverge in their approach to inventive step / non-obviousness?

No, they (EPO and LR PTO) don't diverge

1.33. If yes, is this problematic?
n/a

1. II. Proposals for harmonization

The Groups are invited to put forward proposals for the adoption of harmonised rules in relation to the patentability criteria for inventive step / non-obviousness. More specifically, the Groups are invited to answer the following questions without regard to their national laws:

- i. 34. Is harmonization of inventive step / non-obviousness desirable?
Yes, we assume it is desirable as much as harmonization of legislation
- i. 35. Is it possible to find a standard for inventive step / non-obviousness that would be universally acceptable?
No, it is doubtful.
- i. 36. Please propose a definition for inventive step / non-obviousness that you would consider to be broadly acceptable.
We assume the Article 56 of the EPC could be acceptable. The Latvian Patent law complies with this definition.
- i. 37. Please propose an approach to the application of this definition that could be used by examiners and by courts in determining inventive step / non-obviousness.
No proposal

SUMMARY

In Latvia an invention is considered to be patentable if it satisfies the criteria of patentability, namely, it has novelty, inventive step and is industrially applicable. During registration procedure the criteria of inventive step is not examined by the Patent Office, except for the case when requested by the court during cancellation or infringement proceedings. According to the latest edition of the Patent Law which came into force in March 2007, the definition of inventive step corresponds to the one contained in the EPC (Article 56) and we consider it to be broadly acceptable.

ZUSAMMENFASSUNG

In Lettland gilt eine Erfindung als patentierbar, wenn sie die Kriterien der Patentierbarkeit erfüllt, nämlich Neuheit, Erfindungshöhe und gewerbliche Anwendbarkeit. Das Kriterium der Erfindungshöhe wird nicht vom Patentamt geprüft, außer für den Fall, dass dies im Rahmen eines Verletzungs- oder Nichtigkeitsverfahrens gerichtlich beantragt. Die in der neuesten Fassung des Patentgesetzes, in Kraft seit März 2007, aufgeführte Definition der erfinderischen Höhe stimmt mit der Definition im EPÜ (Artikel 56) überein.

RESUME

En Lettonie l'invention est considérée brevetable si elle confirme des critères de

brevetabilité, à savoir: il a la nouveauté, l'activité inventive et susceptible d'application industrielle. Au cours de procédure d'enregistrement des critères d'activité l' inventive ne sont pas examinées par le bureau des brevets, à l'exception des cas où la Cour demande la conclusion concernant la l'annulation ou la transgression pendant les débats judiciaires. Selon la dernière édition de la loi sur les brevets qui sont entrées en vigueur à partir du mois de mars 2007, la définition de l'activité inventive est entièrement conforme à celle de la CBE (article 56), que nous prenons pour largement acceptable.